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SUBJECT: MEETING OF UNCITRAL WORKING GROUP ON REVISION OF THE UNCITRAL MODEL ARBITRATION RULES

¶1. Summary. UNCITRAL Working Group II met in New York February 9-13 to continue its second reading of the draft revised model arbitration rules. The Working Group completed its review of nine articles: 18 through 26. (The draft text currently contains 41 articles.) Considerable discussion was devoted to provisions relating to the conduct of hearings and testimony by fact witnesses and experts. A particularly controversial issue was interim measures - specifically, the use of ex parte communications with the arbitral tribunal to request a preliminary order in exceptional circumstances. The text agreed upon for articles 18-26 is consistent with U.S. objectives. It is clear that the Working Group will not meet its target of submitting to the UNCITRAL Commission, at its annual summer meeting this year, a completed text for adoption. The Working Group is scheduled to meet again in September with a view to completing its work then, with continuation at a subsequent meeting in February 2010 if necessary. It is understood that, when it completes its current work, the Working Group will - consistent with the existing mandate of the Commission - take up immediately the topic of transparency in treaty-based investor-State arbitration. End summary.

¶2. Issues of note that were addressed by the Working Group (WG) at this session include:

-- The ability of a respondent to raise a counterclaim or to rely on a separate claim for the purpose of setoff (Art. 19): It was debated to what extent, in different legal systems, a counterclaim or a claim for set-off would need to arise out of the same legal relationship as the main claim, and/or fall within the scope of the underlying arbitration agreement. It was concluded that, in order to avoid identifying a substantive rule, it was preferable to state that the respondent may make a counterclaim or rely on a claim for set-off where the tribunal has jurisdiction over either such claim thereby leaving it to the tribunal to determine in a given case whether a counterclaim or set-off falls within its jurisdiction and, ultimately, allowing each legal system to establish substantive rules regarding the extent of such jurisdiction.

-- Witnesses and experts (Art. 25): It was noted that there was lack of clarity in the text about distinguishing fact witnesses from experts presented by a party, and about distinguishing the latter from experts appointed by the tribunal. It was agreed that the text would need to be scrubbed carefully to ensure consistency in terminology about fact witnesses, experts presented by a party, and experts named by the tribunal. There was also agreement to revise the text to clarify that individuals admitted to testify to the arbitral tribunal on any issue of fact or expertise shall be treated as a witness under the Rules, notwithstanding that the individual is a party to the arbitration or in any way related to a party. (The latter is designed to address situations in which the party is a legal person.) The current text further notes that the tribunal "shall determine

the admissibility, relevance, materiality and weight" of evidence that is offered.

-- Sequestration of witnesses (Art. 25): After some discussion, language was preserved from the 1976 Rules affirming that the tribunal may require the retirement of a witness during the testimony of other witnesses. The Secretariat was asked to draft an additional provision stating that, as a general matter, a party appearing as a witness should not be requested to retire during the testimony of other witnesses (as this might be seen as interfering with the rights of the party), but this possibility should not be foreclosed.

-- Interim measures (Art. 26): It was agreed to import language from the recently revised UNCITRAL Model Law on International Commercial Arbitration that identifies both the types of interim measures that might be ordered by a tribunal (while noting that the list was not necessarily exclusive), as well as the conditions that would need to be met in order to justify the granting of interim measures. There was extended debate over whether to include language acknowledging that tribunals could issue preliminary orders on the basis of an ex parte request from one party. Several delegations said that, in their legal systems, arbitral tribunals had no such authority, and that only courts could entertain such ex parte requests. Ultimately, it was agreed to include language that approached the matter neutrally, without prejudice to what national law might provide: Nothing in these Rules shall have the effect of creating a right, or of limiting any right which may exist outside these Rules, of a party to apply to the arbitral tribunal for, and any power of the arbitral tribunal to issue, in either case

without prior notice to a party, a preliminary order that the party not frustrate the purpose of a requested interim measure.

-- Liability for interim measures (Art. 26): The current draft text provides that a party requesting an interim measure, including a preliminary order as discussed above, might be liable for costs or damages arising from such measure/order if the tribunal later determined that the measure/order should not have been granted. It was suggested that conditioning the liability for damages in this way might preclude an award of costs in circumstances where it was nonetheless appropriate to award them because the party that obtained the interim measure did not succeed in its case, even though the criteria for granting the measure/order had been originally satisfied. Before reaching a conclusion on how to handle this issue, the Working Group requested that the Secretariat conduct a study of practice in different legal systems regarding liability for interim measures.

¶3. Future work: The Working Group acknowledged that more time was needed to complete the second reading of the draft text, and that the text was not ready for submission to the UNCITRAL Commission for consideration at its annual meeting this summer. The Working Group intends to resume its review of the text in September in order to complete its work then or, at the latest, in February 2010. It was noted that the Commission had previously directed the Working Group, upon completion of revision of the 1976 Rules, to take up as a matter of priority the topic of transparency in treaty-based investor-State arbitration. Some delegations noted that, during the weeks discussion, other questions had arisen relating to treaty-based arbitration, and it was suggested that the work of the Working Group in that regard might be expanded to include issues relating to investor-State arbitration in addition to transparency. That suggestion remains for future consideration. The U.S. delegation stated that it strongly endorsed consideration of the issue of transparency in keeping with the mandate of the Commission and that, while there may be merit to consideration of other issues relating to investor-State arbitration, that should not detract from addressing transparency as directed by the Commission.

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